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September 9, 1999

BY HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

RECEIVED

SEP 9 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: Notice of Ex Parte Communication Regarding
Interconnection and Resale Obligations Pertaining to
Commercial Mobile Radio Services, CC Docket No. 94-54**

Dear Ms. Salas:

On September 7, on behalf of the Telecommunications Resellers Association ("TRA"), the undersigned of Hogan and Hartson L.L.P. had a telephone discussion with Ari Fitzgerald, Legal Advisor to Chairman William Kennard, regarding the referenced proceeding. Yesterday, the undersigned had separate telephone discussions with Mark Schneider, Senior Legal Advisor to Commissioner Susan Ness, and Robert Calaff, Legal Advisor to Commissioner Harold Furchtgott-Roth, on the same subject.

In the conversations, TRA discussed the importance of Commission enforcement of the current wireless resale obligation, including the need for "rocket docket" or similar treatment of complaints from wireless resellers. TRA also emphasized the importance of access by wireless resellers to billing information in an electronic format. As TRA pointed out, failure to provide such information constitutes an indirect restriction on resale.

TRA also pointed out that Sections 201(b) and 202(a) of the Act, 47 U.S.C. §§ 201(b), 202(a), require CMRS providers to deal with resellers on a reasonable and nondiscriminatory basis. In this connection, TRA provided an excerpt from the 1996 Order in which the Commission extended wireless resale

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Magalie R. Salas
September 9, 1999
Page 2

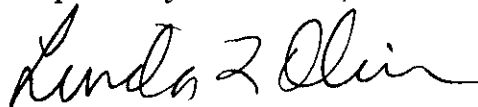
requirements to all CMRS licensees (PCS and covered SMRS) and prescribed a sunset of that requirement. Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96-263, released July 12, 1996, at para. 22. A copy of this excerpt is attached to this letter.

The attached May 24, 1999, letter from David Gusky to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, was also discussed during the telephone conversations. This letter also was forwarded yesterday to Peter Tenhula, Legal Advisor to Commissioner Michael Powell.

I have hereby submitted two copies of this notice for each of the referenced proceedings to the Secretary, as required by the Commission's rules. Please return a date-stamped copy of the enclosed (copy provided).

Please contact the undersigned if you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Linda L. Oliver".

Linda L. Oliver
Counsel for Telecommunications
Resellers Association

Enclosure

cc: Ari Fitzgerald
Dan Connors
Mark Schneider
Peter Tenhula
Robert Calaff



Telecommunications
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May 24, 1999

BY HAND DELIVERY

Thomas Sugrue
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: Interconnection and Resale Obligations Pertaining to
Commercial Mobile Radio Services, CC Docket No. 94-54**

Dear Mr. Sugrue:

On behalf of the Telecommunications Resellers Association ("TRA"), I am writing to underscore TRA's views regarding the CMRS resale rule and the FCC's scheduled sunset of that requirement.

It is critical that the Commission reject any efforts to limit or eliminate the applicability of the wireless resale requirement. Many CMRS providers continue to resist fulfilling their legal obligation to permit unrestricted resale of their services. Discriminatory treatment of wireless resellers is still common, despite the growth of PCS and SMR competition. The FCC must make it clear to the wireless industry that the resale rule will continue in effect and that the FCC is prepared to enforce the rule strictly.

TRA urges the Commission to make the following specific points in its reconsideration order in the referenced proceeding:

1. Review of Market Conditions Prior to Sunset. TRA believes that the Commission's decision to sunset the resale requirement is unlawful and that the sunset should be eliminated. At a minimum, however, the Commission should promise to re-examine competitive conditions in the wireless market *before* allowing any sunset to take place. This

Thomas Sugrue
May 24, 1999
Page 2

is the approach that the Commission took in the LMDS context. ^{1/} Even PCIA, the PCS industry association, agrees that the CMRS market is far from competitive today. ^{2/} Unless and until the Commission can determine that resale is freely available and that discrimination against wireless resellers is unlikely to take place (a determination it could not make today), the Commission cannot lawfully eliminate the resale obligation.

^{1/} In the LMDS proceeding, the Commission said that it would re-evaluate the level of competition in the LMDS market before permitting the scheduled sunset of the eligibility restrictions on ILEC and cable company ownership of in-region LMDS licenses. Specifically, the Commission stated that it would need to conduct a study "examining whether 'there [has been] sufficient entry and increases in competition in the markets at issue . . . for us to be able to sunset the restrictions on incumbent LECs and cable companies.'" Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules, Third Order on Reconsideration, CC Docket No. 92-297, FCC 98-15 (rel. Feb. 11, 1998), at ¶ 113, quoting Second Report and Order in CC Docket No. 92-297, 12 FCC Rcd 12545, 12633 (para. 198). See also id. at ¶ 112.

^{2/} In its reply comments in the commercial mobile radio services (CMRS) spectrum cap proceeding, PCIA opposed lifting the spectrum cap, citing data showing that the PCS share of the wireless market is still relatively low, and arguing that the CMRS market is still "extraordinarily concentrated." See Reply Comments of the Personal Communications Industry Association (PCIA) in 1998 Biennial Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, et al., filed Feb. 10, 1999, at 8 (copy placed in record of CC Docket 94-54 on March 17, 1999). PCIA's own data show that the FCC's decision to sunset the wireless resale requirement, which was based on predictions of the effect of the introduction of PCS on the competitiveness of the wireless market, was not well-founded.

2. Access to Electronic Billing Information. Access to electronic billing information is essential, as a practical matter, to enable resellers to generate their own bills for their retail customers. The Commission should declare that a refusal to provide reseller customers with access to billing information in an electronic format constitutes an unlawful indirect restriction on resale, in those instances in which the carrier has the capability to provide the information in that format.
3. Application of Rocket Docket Procedures to Wireless Resale Complaints. The Commission should declare that accelerated docket procedures will apply to complaints alleging noncompliance with the wireless resale requirement. This will send the strong signal that the Commission will not tolerate carrier resistance to reseller requests for service.
4. Resale of Wireless/CPE Bundled Offerings. The Commission should keep in place the longstanding requirement that CMRS providers must permit resellers to resell bundled offerings of wireless service and equipment. In the absence of such a requirement, carriers could use the bundle as a means to provide effective discounts in service that would be unavailable to resellers. If the Commission does eliminate the resale requirement for bundled offerings, it should, at a minimum, clearly reaffirm that the airtime portion of the bundle be available for resale.
5. No Market-by-Market Elimination of the Resale Requirement. The Commission should not open the door to the filing of forbearance petitions on a market-by-market basis. The arrival of additional competitors in the wireless market has not changed the incentives or behavior of wireless carriers (including new entrants) toward their reseller customers. Furthermore, any attempt to evaluate the need for a resale requirement in a particular market would exhaust the Commission's resources. There is no bright line test that could lawfully be applied to justify forbearance on a market-by market basis.

Thomas Sugrue
May 24, 1999
Page 4

TRA urges the Commission to clarify the above points in its reconsideration order. Please give me a call if you have any questions about the above points or would like to discuss these issues further.

Sincerely yours,

A handwritten signature in cursive script that reads "David Gusky" followed by a stylized flourish or initials.

David Gusky
Executive Vice President

cc: Magalie R. Salas, Secretary
Ari Fitzgerald
Peter Tenhula
Dan Connors
Kevin Martin
Karen Gulick
Diane Cornell
Jim Schlicting
Nancy Boocker
Jeanine Poltronieri
Walter Strack
Jane Phillips

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)
)
Interconnection and Resale Obligations)
Pertaining to) CC Docket No. 94-54
Commercial Mobile Radio Services)

FIRST REPORT AND ORDER

Adopted: June 12, 1996; Released: July 12, 1996

By the Commission: Commissioner Chong issuing a statement.

TABLE OF CONTENTS

	<u>Paragraph</u>
I. INTRODUCTION AND EXECUTIVE SUMMARY	1
II. BACKGROUND	3
III. COMMENTS AND DISCUSSION	7
A. General Considerations	8
B. Application to Specific Services	15
C. Sunset	23
D. Resale by Facilities-Based Competitors	25
E. Other Issues	31
IV. CONCLUSION	33
V. PROCEDURAL MATTERS	34
A. Regulatory Flexibility Act	34
B. Authority	35
C. Further Information	36

by classes of CMRS other than cellular, broadband PCS and covered SMR providers warrant a decision not to apply the resale rule to these other carriers.⁶²

22. Finally, we do not by this Order relieve CMRS providers of any portion of their statutory obligation under Sections 201(b) and 202(a) of the Act, nor do we determine that any resale practice is just and reasonable *per se*. Therefore, to the extent that a CMRS provider offers interstate service, an unjust or unreasonable resale practice or unjust or unreasonable discrimination against resellers may be the subject of a complaint alleging a statutory violation under Section 208 of the Act. In deciding such a complaint, we would consider whether the activity complained of is unjust and unreasonable based on all the circumstances of the case, including the market conditions affecting that particular carrier. Of course, to the extent a cellular, broadband PCS, or covered SMR provider violates our rule adopted here, a Section 208 complaint concerning such rule violation may be filed regardless of whether the service is interstate or intrastate.⁶³

C. Sunset

23. Geotek argues that if we decide that unrestricted resale of cellular service is necessary to help PCS licensees overcome the headstart enjoyed by their cellular competitors, the rule should continue to apply only for a five-year period. At the end of that time, Geotek states, PCS providers should no longer need to rely on resale and all resale obligations for CMRS providers should be eliminated.⁶⁴ For similar reasons, Bell Atlantic suggests that we reexamine the costs and benefits of the resale rule after we finish awarding PCS licenses.⁶⁵

24. We agree with Geotek and Bell Atlantic that the competitive development of broadband PCS service will obviate the need for a resale rule in the cellular and broadband PCS market sector. Our rules require broadband PCS licensees to significantly build out their networks within five years of being licensed.⁶⁶ Thus, within five years after the D, E, and F block broadband PCS licenses are awarded, it is reasonable to anticipate that there will be up to six facilities-based broadband PCS carriers, as well as potentially one or more covered SMR providers, competing with two cellular licensees in every geographic area. We therefore provide that application of the resale rule to cellular, broadband PCS and covered SMR

⁶² Because of this conclusion, we need not address arguments that resale of these services is technically infeasible or would cause other harms. See, e.g., GTE Comments at 18-21; In-Flight Comments at 5-8.

⁶³ See *Continental Mobile Telephone Co. v. Chicago SMSA Limited Partnership*, 9 FCC Rcd 1583 (1994).

⁶⁴ Geotek Reply Comments at 4.

⁶⁵ Bell Atlantic Comments at 11-12.

⁶⁶ 47 C.F.R. § 24.203.